IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22170

HAROLD FRANKLIN SMITH,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

(February 1, 1966.)

Before GEWIN and BELL, Circuit Judges, and HUGHES, District Judge.

PER CURIAM: The appellant was tried by a jury and convicted under a single count indictment charging him with possession of certain described property intended for use in violation of the Internal Revenue laws with respect to distilled spirits. He contends that the Court erred in overruling his motion for a judgment of acquittal because the evidence was not sufficient to sustain the verdict.

We have reviewed the evidence and are convinced that it was ample and sufficient. See *Lambert* v. *United States*, (5 Cir. 1958) 261 F.2d 799; *Roberts* v. *United States*, (5 Cir. 1945) 151 F.2d 664.

The judgment is AFFIRMED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22,170

HAROLD FRANKLIN SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

(Filed March 23, 1966.)

On Petition for Rehearing

Before GEWIN and BELL, Circuit Judges, and HUGHES, District Judge.

PER CURIAM:

IT IS ORDERED that the Petition for Rehearing in the above entitled and numbered cause be, and the same is hereby DENIED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22170

HAROLD FRANKLIN SMITH,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days from March 23, 1966; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from March 23, 1966 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from March 23, 1966 unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Walter P. Gewin
United States Circuit Judge.

(ORIGINAL FILED—MARCH 31, 1966.)

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1965

No. 22170

D. C. Docket No. 5388-Criminal

HAROLD FRANKLIN SMITH,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before GEWIN and BELL, Circuit Judges, and HUGHES, District Judge.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 1, 1966

Issued as Mandate:

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1244

HAROLD FRANKLIN SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1) is reported at 356 F. 2d 181.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1966. A petition for rehearing was denied on March 23, 1966. The petition for a writ of certiorari was filed on April 22, 1966. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to sustain petitioner's conviction of possessing property intended for use in violating the liquor tax laws.

STATUTE INVOLVED

26 U.S.C. 5686 provides:

§ 5686. Penalty for having, possessing, or using liquor or property intended to be used in violating provisions of this chapter.

(a) General.

It shall be unlawful to have or possess any liquor or property intended for use in violating any provision of this chapter or regulations issued pursuant thereto, or which has been so used, and every person so having or possessing or using such liquor or property, shall be fined not more than $5,000, or imprisoned not more than 1 year, or both.

STATEMENT

Petitioner was convicted after a trial by jury in the United States District Court for the Northern District of Georgia on a single-count indictment charging petitioner and Walton Davis,[1] aided and abetted by each other and other persons unknown,

[1] Prior to petitioner's trial, Davis entered a plea of guilty to the charge.

with possessing certain distillery equipment and supplies with the intent to use them to violate the Internal Revenue laws, in violation of 26 U.S.C. 5686 (R. 1-3). Petitioner was sentenced to twelve months' imprisonment (R. 3-4). The sole question raised on appeal was the sufficiency of the evidence, an issue which was resolved against petitioner by the court of appeals *per curiam* (Pet. App. A1).

The evidence at trial showed that, on September 16, 1964, two United States Internal Revenue agents located a non-registered distillery in a barn on the Walton Davis farm in Jackson County, Georgia (R. 16, 19, 25, 30-31, 51, 85). The distillery, which had been in operation in the barn for some time (R. 22-23), was apparently in the process of being dismantled for movement to another location (R. 28, 51). About 4:00 p.m., agents observed four men, one of whom was petitioner, and four trucks around the distillery. Petitioner was working on the tailgate of one of the trucks. About 6:10 p.m., petitioner was further observed receiving narrow mattresses and flues (used in the boiler of the distillery) which were passed to him from the barn. Petitioner stacked these items on one of the trucks (R. 3-33).

About 7:00 p.m., two of the trucks left. About 8:00 p.m. the other two loaded trucks began to leave, and the revenue agents blocked the driveway. The occupants of the trucks jumped out and ran. The pursuit ended almost immediately when one of the investigators fell into a ravine and broke his legs (R. 16-18, 34, 51-52). While others were rendering assistance to

the injured official, another agent heard a noise from the nearby weeds (R. 52). Petitioner was then discovered lying face down in the bushes about ten steps from a truck which contained 300 cases of plastic jars (R. 16-18, 26-27).[2] Petitioner explained to the agents that he was fishing (R. 16-17).

The agents then searched the rest of the farm. On another truck parked in an unused chicken house, they found, among other things, a boiler, wheat bran, an alcoholic proof hydrometer, dirty clothes with traces of mash on them and a pair of pants on the right front pocket of which petitioner's name had been written in ink (R. 19-20, 53). Petitioner's fingerprint was discovered on a half-gallon jar of non-tax-paid whiskey found in the barn housing the distillery (R. 60-75).

ARGUMENT

Petitioner's contention that the evidence was insufficient to justify the jury's inference that he had possession of the distillery equipment and associated items is patently unsound. The evidence amply supported the jury's conclusion that petitioner, acting jointly with others, was exercising dominion and control over the various items by loading them on the trucks and removing them from the distillery site. At the very least, petitioner's acts in helping to move the

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[2] The remaining truck was loaded with a complete still and numerous related items (R. 16-17). The contents of both trucks, as well as other items found on the farm, were listed in the indictment.

distillery amounted to aiding and abetting or facilitating the owner's possession of the distillery equipment within the rule suggested by this Court in *Bozza* v. *United States*, 330 U.S. 160. The evidence in this case is at least as probative in this regard as the evidence in *United States* v. *Romano*, 382 U.S. 136, 138, where this Court noted that "[i]f we were reviewing only the sufficiency of the evidence to support the verdict on [the count charging possession of an illegal still], that conviction would be sustained." [3]

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
PAUL C. SUMMITT,
Attorneys.

MAY 1966

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[3] Romano was present at the still site at the time of the raid and showed one of the agents how to turn the still motor off. He had also been observed several times using a truck to pick up jars and sugar. *United States* v. *Romano*, 330 F. 2d 566, 568-569 (C.A. 2). The only issue before this Court was the validity of a statutory presumption of possession, which is not involved in the instant case.

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